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CASE NO. PD-0488-20

JESSE VILLAFRANCO, JR.,
Defendant-Appellant

v.

STATE OF TEXAS,
Plaintiff-Appellee

FROM THE COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

REPLY BRIEF OF DEFENDANT-APPELLANT

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Introduction

This reply brief will address the State's argument defending the court of appeals' decision not to remand this case to the trial court pursuant to Rule 44.4 of the Texas Rules of Appellate Procedure.

The argument for such a remand is simple and clear. At trial, the defense sought to inquire into a specific instance of the alleged victim's sexual past to rebut the assertion that the scarring near her vaginal area was caused by the defendant's alleged penetration of her. The trial court held an *in camera* hearing pursuant to Rule 412(c) at which he excluded trial counsel and the defendant. Hearings pursuant to Rule 412(c), however, are adversarial hearings at which counsel are to be present. Although defense counsel failed to object to the trial court's decision to exclude him and his client from the hearing, because the Rule 412(c) hearing is a critical stage, the error of excluding counsel from the proceeding cannot be forfeited. The proper remedy for this error, therefore, is to abate the appeal and remand the case to the trial court to afford the defendant an adversarial hearing at which he will have an opportunity to cross-examine the witness.

In its response, the State agrees that the Rule 412(c) hearing is an adversarial proceeding. The State also does not take issue with the fact that it is a critical stage, and that according to this Court's precedent, the normal remedy for error in

conducting the Rule 412(c) hearing is a remand pursuant to Rule 44.4 of the Texas Rules of Appellate Procedure. *LaPointe v. State*, 225 S.W.3d 513, 523 (Tex. Crim. App. 2007).

The State's sole basis for distinguishing this case from this Court's prior decision in *LaPointe* is that trial counsel, in this case, failed to object to his and his client's exclusion from the Rule 412(c) hearing. First, the State asserts that this failure to object constitutes an affirmative waiver. Alternatively, the State asserts if there was no affirmative waiver, then this Court should overrule its precedent holding that affirmative waiver is required when counsel is excluded from a critical stage and hold that such exclusions may be forfeited.

Discussion

In *Gilley v. State*, 418 S.W.3d 114, 119 (Tex. Crim. App. 2014), this Court held, "[T]he right to counsel at a critical stage of the criminal proceedings must be affirmatively waived and cannot be forfeited by inaction alone." On pages 18-19 of its response, the State argues that appellant affirmatively waived his right to counsel at this proceeding because his counsel agreed that as a matter of law the Rule 412(c) hearing should be conducted *in camera* without the presence of counsel or the defendant. Although it is factually true that appellant's trial counsel erroneously agreed that Rule 412(c) hearings should be conducted in this manner, the State is legally incorrect in construing mistaken legal knowledge as an affirmative waiver.

An affirmative waiver of a right means the "intentional relinquishment or abandonment of a known right or privilege." *Eg., Janecka v. State*, 739 S.W.2d 813, 829 (Tex. Crim. App. 1987), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Clearly, in this case, appellant's counsel erroneously believed that he and his client did not have a right to be present in the proceeding. Because neither appellant nor his counsel knew they had a right to be present in the Rule 412(c) proceeding, they, therefore, could not have knowingly and intentionally given up that right. In making the argument that the trial counsel's erroneous understanding of the law constitutes waiver, the State is conflating the concept of waiver and forfeiture, and inviting this Court erroneously to do the same.

On pages 13-14 of its response, the State alternatively argues this Court should overrule its decision in *Gilley*, holding that denial of counsel at a critical stage is not subject to forfeiture. In doing so, it notes that twice Texas courts of appeals have held that the failure to object to the denial of closing argument, a critical stage, constitutes procedural default. *Foster v. State*, 80 S.W.3d 369, 640-41 (Tex. App. — Houston [1st Dist.] 2002, no pet.); *Habib v. State*, 431 SW.3d 737, 740-42 (Tex. App. — Amarillo, 2014, pet. ref'd.). Although this is true, in neither of those decisions did the courts of appeals note that closing argument is a critical stage. The courts in those decisions simply treated the denial of closing argument as a procedural error subject to forfeiture without further analysis.

On the other hand, this Court not only held in 2014 in *Gilley* that the right to counsel at a critical stage must be affirmatively waived, it also explicitly stated this in 1994 in *Oliver v. State*, 872 S.W.2d 713, 716 (Tex. Crim. App. 1994). Moreover, this Court is not free to overrule these holdings but is bound by U.S. Supreme Court precedent. The Supreme Court first held that the denial of counsel at a critical stage must be knowingly and intelligently relinquished for there to be a valid waiver in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) and more recently, in *Iowa v. Tovar*, 541 U.S. 77, 81 (2004).

Without a knowing and intelligent waiver of the right of counsel to participate in the Rule 412(c) hearing, there was error. Although, according to this Court's reasoning in *Lake v. State*, 532 S.W.3d 408, 415-16 (Tex. Crim. App. 2016), this error does not constitute structural error requiring automatic reversal, it should not be subject to harmless error review. The proper remedy for this error, according to this Court's prior decision in *LaPointe*, is to abate the appeal and remand the case to the trial court for an evidentiary hearing pursuant to Texas Rule of Appellate Procedure Rule 44.4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Franklyn Mickelsen, certify that on December 4, 2020, I caused the foregoing document to be served on Erik Kalenak of the Midland County District Attorney's Office, via electronic filing.

/s/ Franklyn Mickelsen
Franklyn Mickelsen

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Tex. R. App. P. 9.4 because this brief contains 952 words, excluding the parts of the brief exempted by the rule.

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